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8 UNITED STATES DISTRICT COURT

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10 NORTHERN DISTRICT OF CALIFORNIA

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12 DAVID WIT, et al.,
13 Plaintiffs,
14 vs.
15 UNITED BEHAVIORAL HEALTH,
16 Defendant.

Case No. 14-cv-02346-JCS
Related Case No. 14-cv-05337-JCS

**SPECIAL MASTER'S ORDER
REGARDING PLAINTIFFS' SEPTEMBER
24, 2021 LETTER**

17 GARY ALEXANDER, et al.,
18 Plaintiffs,
19 vs.
20 UNITED BEHAVIORAL HEALTH,
21 Defendant.

1 **I. INTRODUCTION**

2 On December 3, 2021, the Special Master issued an order that resolved fourteen questions
 3 posed by Plaintiffs and jointly addressed by the parties. *See* Special Master’s Order Regarding
 4 Implementation Issues Addressed in the Parties’ May 28, 2021 Joint Submission
 5 (“Implementation Order”) (ECF No. 568). In September 2021, Plaintiffs submitted a letter to the
 6 Special Master (“Plaintiffs’ Letter”) raising additional issues related to the joint submission, to
 7 which UBH responded in October 2021 (“UBH Letter”). This Order resolves the issues raised in
 8 Plaintiffs’ Letter.¹

9 **II. BACKGROUND**

10 The Special Master assumes familiarity with the Implementation Order, and therefore
 11 focuses on the facts relevant to this Order.

12 The parties have been litigating UBH’s implementation of the Court’s Remedies Order for
 13 the better part of the past year. In May 2021, the parties summarized their positions on the
 14 disputed issues in a joint submission. The joint submission raised fourteen questions. Two are
 15 relevant here.

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- 17 • The first is Question 8: “Does faithful application of the clinical guidelines mandated by
 the Injunction require UBH to consider which sub-level of residential treatment is most
 appropriate when the LOCUS analysis shows that residential treatment is indicated?”
- 18 • The second is Question 9: “Does the injunction’s requirement to faithfully apply the
 mandated criteria cover only the residential treatment, intensive outpatient, and outpatient
 treatment levels of care, or is UBH required to faithfully apply the entirety of each clinical
 guideline, regardless of what level of care is requested?”

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21 Unlike other questions (e.g., Question 7) these two do not call for a “retrospective review”
 22 of UBH’s benefit determinations since November 2020, when the Remedies Order was entered.
 23 For that reason, no “retrospective review” was ordered by the Special Master.

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25 ¹ On January 7, 2022, UBH indicated that it objected to this order for the reasons stated in
 26 the UBH Letter. UBH noted that it would nevertheless meet and confer in good faith with
 27 Plaintiffs on the issues and report the results of those discussions within 30 days of the
 28 Implementation Order becoming final or the Order on September 24, 2021 Letter becoming final,
 whichever is later. Since UBH’s objections re-state arguments already addressed in this order and
 in the Implementation Order, the Special Master now files this order over those objections.

1 On September 14, 2021, the Special Master provided the parties with a draft of the
 2 Implementation Order for their review. At this point, Plaintiffs recognized that the parties' joint
 3 submission "did not squarely call for a retrospective review to determine whether erroneous
 4 denials occurred because of UBH's failure to apply the criteria for ASAM Level 3.2-WM (i.e.,
 5 low-intensity residential detoxification treatment), or the sublevels of mental health residential
 6 treatment identified in the LOCUS." Plaintiffs' Letter at 1–2. Plaintiffs' Letter, dated September
 7 24, 2021, thus "explicitly" requested these "retrospective review[s]." UBH opposed Plaintiffs'
 8 request in a letter dated October 28, 2021. These letters are attached as Exhibit A and Exhibit B.

9 **III. DISCUSSION**

10 **A. ASAM Level 3.2-WM (Clinically Managed Residential Withdrawal
 11 Management)**

12 Level 3.2-WM (Clinically Managed Residential Withdrawal Management) "is an
 13 organized service that may be delivered by appropriate trained staff, who provide 24-hour
 14 supervision, observation, and support for patients who are intoxicated or experiencing
 15 withdrawal." ASAM Criteria at 137. This level is intended for patients who are "experiencing
 16 signs and symptoms of withdrawal, or there is evidence (based on history of substance intake; age;
 17 gender; previous withdrawal history; present symptoms; physical condition; and/or emotional,
 18 behavioral, or cognitive condition) that withdrawal is imminent." *Id.* at 165.

19 Before the Special Master's Implementation Order, UBH had been instructing its
 20 personnel that "ASAM Level 3.2 Withdrawal Management (WM) is Not a Covered Benefit." *See*
 21 B50; *see also* D26; D28; D32; D34; D37; D40; D42; D45. In the Implementation Order, the
 22 Special Master held that "UBH cannot refuse to consider the criteria for ASAM Level 3.2 WM
 23 when that level is not excluded by the plan." Implementation Order at 33. The Special Master
 24 therefore ordered UBH to revise any materials suggesting that Level 3.2-WM is never a covered
 25 benefit. *See id.* at 34.

26 Plaintiffs are concerned that UBH's instructions on Level 3.2-WM, like the one above,
 27 may have led to erroneous denials of requests by members whose plans do not exclude this level.
 28 To assess the scope of this potential problem, Plaintiffs ask the Special Master to investigate

1 UBH's denials of requests for Level 3.2-WM since the Remedies Order was entered in November
 2 2020. Plaintiffs equate UBH's instructions on Level 3.2-WM to the "ASAM Level 3.1 and Level
 3 3.3" section of UBH's ASAM Workflow. As discussed in the Implementation Order, the Special
 4 Master found that "UBH's personnel could reasonably interpret [that] section of the ASAM
 5 Workflow to mean that ASAM Levels 3.1 and 3.3 are never covered, whether or not those levels
 6 are excluded from a plan." Implementation Order at 17. Thus, the Special Master concluded, this
 7 section *could have* led to erroneous denials of requests for Levels 3.1 and 3.3. *Id.* To determine
 8 whether it actually *did* lead to erroneous denials, the Special Master directed that UBH's denials of
 9 requests for these levels be sampled. Plaintiffs ask for the Special Master to order the same kind
 10 of "retrospective review" for Level 3.2-WM.

11 UBH contends that "retrospective review" is inappropriate here for three reasons. *See*
 12 UBH Letter at 1–2. First, because Level 3.2-WM "was not a litigated issue in this case." *Id.*
 13 Second, because Plaintiffs "cite no evidence" that UBH's instructions did, in fact, result in
 14 erroneous denials. *Id.* at 2. Third, because sampling past denials "will impose significant burdens
 15 on UBH to collect, redact, and produce potentially voluminous case records." *Id.* at 2. According
 16 to UBH, its "structured data does not separately indicate which particular sublevel of residential
 17 detoxification services are being requested by a provider," as "providers do not typically request a
 18 specific ASAM sublevel of residential detoxification." *Id.* As a result, it would be difficult even
 19 to identify which claims should be sampled, "likely requir[ing] a burdensome manual review of
 20 the clinical notes associated with each request for withdrawal management services at all
 21 'residential' levels and an individualized clinical assessment of whether the services requested
 22 constitute ASAM Level 3.2-WM services." *Id.* UBH also asserts "ASAM does not offer
 23 certification or accreditation of ASAM Level 3.2-WM providers," further complicating any
 24 review. *See id.*

25 In the Implementation Order the Special Master explained that "retrospective looks" had
 26 been ordered where "there is a substantial risk of violations of the Remedies Order."
 27 Implementation Order at 47–48. The Special Master finds such a risk with respect to ASAM
 28 Level 3.2-WM. Like the "ASAM Level 3.1 and Level 3.3" section of UBH's ASAM Workflow,

1 UBH'S materials with respect to ASAM Level 3.2-WM could reasonably be interpreted to mean
 2 that the level at issue – ASAM Level 3.2-WM – is never covered, whether or not that level is
 3 excluded from a plan. This would violate the Court's order that UBH must consider “the criteria
 4 applicable to each of the sub-levels of residential treatment identified in the ASAM Criteria.”
 5 Remedies Order, Section IV.b.a at 96.

6 UBH's arguments to the contrary are unavailing, as already explained in the
 7 Implementation Order. First, while the Remedies Order did not specifically identify ASAM Level
 8 3.2-WM, it instructed UBH to apply the criteria for all ASAM levels of care; the Court did not
 9 exclude any particular level of care. *See* Implementation Order at 34. Second, UBH's point that
 10 Plaintiffs “cite no evidence” of erroneous denials of requests for Level 3.2-WM is unpersuasive.
 11 The Special Master is charged with verifying UBH's compliance, and the evidence of UBH's
 12 compliance, including whether the risks of such denials have materialized, are in UBH's files, not
 13 Plaintiffs'. *See id.* at 27. Third, UBH has provided no evidence of burden, including no estimate
 14 of the denials of requests for coverage at Level 3.2-WM. *See id.* at 27–28. Without any
 15 substantiation of UBH's burden claim, the Special Master is not in a position to evaluate it. *See*
 16 *id.* at 28. Moreover, sampling is designed to minimize this burden. *See id.*

17 Therefore, the Special Master orders the parties to meet and confer on a process by which
 18 UBH's denials of requests for coverage at Level 3.2-WM since November 3, 2020, may be
 19 sampled to determine whether UBH's instructions on Level 3.2-WM have inappropriately resulted
 20 in denials for those members whose plans do not exclude this level from coverage. The parties
 21 shall report the results of their meet and confer, and propose an appropriate sampling methodology
 22 to the Special Master within 30 business days of this Order becoming final or within 30 business
 23 days of the Implementation Order becoming final, whichever is later.

24 **B. LOCUS Level 5 Sublevels**

25 The LOCUS Supplementary Criteria for Residential Placement (Appendix 1 to LOCUS),
 26 explains that Level 5 – “Medically Monitored Residential Services” – has three distinct
 27 “sublevels.” LOCUS at 35. For each sublevel, “specific LOCUS criteria in a client's profile
 28 indicate their appropriateness for the designated service.” *Id.* at 33.

1 In the parties' joint submission, Plaintiffs argued that, for patients who qualify for Level 5,
 2 UBH must determine which sublevel is most appropriate. Joint Submission at 44–46. UBH's
 3 Guideline Scoring Tool does not identify which Level 5 sublevel is appropriate. While UBH did
 4 not dispute this point, it argued that its failure to consider the appropriate sublevel is not a "barrier
 5 to coverage." Aug. 16 Tr. at 81:7–8. UBH further represented that: "UBH's current practice is to
 6 authorize services for 'residential treatment' so long as the member satisfies *lower* threshold
 7 criteria for LOCUS 5. For example, if a provider requests coverage for mental health 'residential
 8 treatment' and proposes a treatment plan consistent with LOCUS sublevel 5C, UBH's current
 9 practice is to authorize coverage if the member satisfies the threshold criteria for LOCUS Level
 10 5." Objection at 9.

11 Still, the Special Master ordered that – going forward – UBH must determine the
 12 appropriate Level 5 sublevel for patients who qualify for Level 5. *See* Implementation Order at
 13 32. Since UBH represented "its failure to apply the criteria for the sublevels and to determine the
 14 appropriate Level 5 sublevel is not a barrier to coverage," *see id.* at 31, the need to correct its
 15 failure was less urgent, *see id.* at 32. Thus, the Special Master ordered that, "[u]ntil a final plan for
 16 UBH's use of LOCUS Sublevels 5A, 5B, and 5C is approved by the Special Master, UBH shall
 17 not be required to determine coverage for mental health residential treatment services for members
 18 with a LOCUS Level 5 score based on the application of the supplemental criteria for LOCUS
 19 sublevels 5A, 5B, and 5C." *Id.* at 32. The Special Master did not decide whether UBH must
 20 sample its claims determinations for requests for LOCUS Level 5 since the Remedies Order.

21 In their September 24 letter, Plaintiffs ask that the Special Master "investigate whether
 22 UBH's failure to apply the LOCUS's criteria for the sub-levels of residential treatment led to any
 23 erroneous denials" by "conduct[ing] a review of its post-injunction denials." Plaintiffs' Letter
 24 at 2. UBH opposes Plaintiffs' request on three grounds. First, as noted above, UBH's practice is
 25 to authorize services for "residential treatment" so long as the member satisfies the lower
 26 threshold criteria for LOCUS 5 (that is, the least intensive sublevel). UBH Letter at 2–3. So,
 27 UBH contends, its failure to determine the appropriate Level 5 sublevel could not have led to any
 28 "erroneous denials." *Id.* Second, UBH asserts that sampling its past claims determinations for

1 requests for LOCUS Level 5 would impose “significant burdens” on UBH “to collect, redact, and
 2 produce potentially voluminous case records.” *Id.* at 3. Third – and relatedly – UBH’s “structured
 3 data does not separately indicate which particular LOCUS sublevel of residential treatment is
 4 being requested by a provider, in part because providers generally do not request coverage for a
 5 specific sublevel.” *Id.* This means that identifying requests for particular sublevels “would likely
 6 require a burdensome manual review of the clinical notes associated with each request and an
 7 individualized clinical assessment of which (if any) specific LOCUS sublevel was at issue.” *Id.*

8 The Special Master declines to order UBH to sample its past denials of requests for Level
 9 5 at this time. The Special Master notes UBH’s representation that its failure to apply the criteria
 10 for the sublevels and to determine the appropriate Level 5 sublevel is not a “barrier to coverage.”
 11 Aug. 16 Tr. at 81:7-8. Moreover (and perhaps in light of UBH’s representation), Plaintiffs have
 12 agreed that “UBH shall not be required to determine coverage for mental health residential
 13 treatment services for members with a LOCUS Level 5 score based on the application of the
 14 supplemental criteria for LOCUS sublevels 5A, 5B, and 5C” “[u]ntil a plan for UBH’s use of
 15 LOCUS Sublevels 5A, 5B, and 5C is approved by the Special Master.” Parties’ Nov. 5, 2021
 16 Agreed Revisions to Special Master’s Draft Implementation Order at 30–31; Implementation
 17 Order at 32. This agreement eliminates the need for a “retrospective look” at this time.

18 **C. UBH’s Data Dictionary**

19 Plaintiffs also ask the Special Master to order UBH to produce the current version of its
 20 Data Dictionary, which identifies and defines the structured data fields in the databases. Plaintiffs’
 21 Letter at 2. Plaintiffs believe that their access to UBH’s Data Dictionary will facilitate the parties’
 22 efforts “to design an appropriate sampling protocol.” *Id.* UBH did not oppose Plaintiffs’ request
 23 in its October 28 letter; nor has UBH presented evidence that producing the Data Dictionary
 24 would be unduly burdensome. Therefore, the Special Master orders UBH to produce the current
 25 version of its Data Dictionary as soon as reasonably possible.

26 **IT IS SO ORDERED.**

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 28 //

1 Dated: January 20, 2022

FARELLA BRAUN + MARTEL LLP

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By: /s/ *Douglas R. Young*

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Douglas R. Young

Special Master

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